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THE BUSINESSMAN & THE LAW

A TIMELY REPORT ON ACTUAL LEGAL CASES AND THEIR EFFECT ON YOUR DAY-TO-DAY BUSINESS DECISIONS

CAN A WRITTEN CONTRACT BE CHANGED ORALLY?

What Happened: People who place their signatures on a written contract generally expect to be irrevocably bound by their act. "Otherwise, why sign it?" they might well ask. One businessman who asked that question found his answer via a law suit.

In the process of expanding his pottery business, Andrew Nubbard engaged Walter Sturges, a general contractor, to erect a building for him. The two men entered into a written agreement calling for the construction of a 2-story concrete-block edifice. The price agreed upon for the job was $12,500.

After Sturges started on the job, he found that the ground would not support the building unless he dug considerably deeper for a footer. The contractor informed Nubbard that this would involve an expense that the contract had not anticipated.

"Don't worry about it. I'll pay for it, whatever it comes to," was Nubbard's response. Sturges thereupon went ahead with the extra work.

The final bill for the construction job came to $14,700. However Nubbard then announced that he would not pay a penny more than $12,500 – the price in the contract. But Sturges stubbornly demanded the full $14,700 and sued for it rather than take less.

When the case came up in court, Nubbard defended with:

1. *All I* owe is $12,500 – the price in the signed contract. You can't change a written contract by anything you later say in a conversation.
2. Besides, that additional $2,200 was a "hold-up" – the building was already under way when Sturges hit me for it. He knew how difficult it would be for me to refuse it then.

Sturges replied:

- The additional costs were genuine.
- Who says you can't change a written contract orally? You can, if both sides agree. Here, we both agreed.

The Decision: *The oral change was valid.* A Pennsylvania Superior Court held that written contracts are not immutable. If both sides reach an accord – even if only by word of mouth – they can alter, abandon, or replace their agreement.

What's more, the evidence was very strong in this case that Sturges' additional expenses were really what he said they were. (119 A. 2d 568)

And That Isn't All: Many states say a written contract can be modified or abandoned even without words. It can be done by conduct.

Examples: (1) A supplier enters into a written agreement to ship certain merchandise to a customer. The goods shipped to the customer differs from those described in the agreement. Nevertheless, the customer receives, inspects, pays for and then resells the merchandise. This contract has been altered even though neither party has acknowledged that in so many words.

(2) Smith contracts with Brown to paint his office on January 15th. But before the 15th rolls around, Smith has had a change of heart and has engaged Jones to do the same job. On January 15th, Brown is found painting a retail store for the same amount of money he would have earned from Smith. Even though nobody said a word, the contract between Smith and Brown was abandoned by the mutual agreement.

CAN AN UNDERSTAFFED DEPARTMENT HEAD CLAIM COMPENSATION FOR A HEART ATTACK?

What Happened: A supervisor's life is not a placid one. Over and above the daily hectic routine, there come those all-too-frequent crises that make the heart pound, the knees shake, and the palms sweat. Many such a harried executive can be heard to say: "One of these days I'm going to fall flat on my face!" Sometimes that is exactly what happens.

Ted Harman was sales manager for Good Food Products. It was his job to handle the details of introducing new lines. This was usually done on a regional basis and entailed coordinating advertising campaigns, merchandise displays, and sales pitches to retail personnel at luncheons, dinners, interviews, etc. Ted was always aided and abetted by two assistants. He knew his job and did it well.

Came the time to kick off the campaign for a new breakfast cereal that market research predicted would be a winner if the initial push went off as planned. At this critical point, Harman had a serious personnel problem. He went to his company president to kick it around.

"The new Crispies are ready to go – everything's set and today Tom's wife called me to say he's down with the flu," Harman told his boss. "With Blaine quitting last week, that leaves me without home-office help for the first days of the campaign."

"Blaine wasn't much good anyway – I've always told you that. You'll have to use our local people wherever you can. You're our top man, Ted. In the pinch, I know you can handle it by youself."

The usually hypertense Harman was now really in a bind – but with a "do or die" attitude, he plunged ahead.

Early the next morning, he took off for Chicago. The plane developed engine trouble and had to turn back. When he finally reached the Windy City, he had to rush to the TV studios and pass up his lunch.

Immediately thereafter, he embarked on a round of supermarkets where he distributed posters, supervised display set-ups, and pitched the help. That night, he threw a party for the local distributors and regaled them with a glowing recital of the merits of the new product.

By 2 A.M., he retired to his hotel room completely exhausted. The next morning he awoke with a splitting headache – the thought of another tight schedule for the coming day had kept him awake most of the night. He reached for the phone to call room service and fell unconscious to the floor. Ted Harman had suffered a heart attack.

He applied for workmen's compensation benefits, claiming:

- I suffered an attack while engaged in my employment. It was caused by my employment – I am therefore entitled to benefits.

The insurance company demurred:

- You are entitled to benefits only for accidental injury directly caused by your employment. Such is not the case here.

The Decision: *The employee is entitled to benefits,* ruled the N. Y. Appellate Court. An injury caused by emotional stress or strain can be considered an accident.

The employee's work activities for the period immediately preceding his attack involved unusual and considerable emotional stress, anxiety and tension which, superimposed on his normal hypertension, precipitated the attack. It was therefore an accidental injury. (19 A. D. 2d 931)

→ **More On The Subject:** Heart attacks, strokes, nervous disorders, tuberculosis, and many other diseases which result from gradually aggravated, long standing conditions, always present a difficult question of whether they are job connected. Most such diseases are caused by an accumulation of environmental factors derived both from work and non-work conditions.

All the same, courts have frequently awarded workmen's compensation to such victims. Here are some cases where employees won:

1. An employee in a factory who suffered a nervous breakdown because of the tensions caused by assembly-line pressures.
2. An employee who suffered a heart attack in an argument with his boss.
3. The engineer sent out on an emergency maintenance job–fearing failure to go would mean his dismissal–who suffered a stroke.

You Be The Judge

DOES A PROMPT STOP PAYMENT ORDER ON A CHECK YOU ISSUED ALWAYS PROTECT YOU?

What Happened: More than one hasty businessman has drawn comfort from the fact that he has paid his bills by check. His ace-in-the-hole for rectifying a mistake is the stop payment order to his bank. If he moves promptly – let us say, the day after issuing the check – he can still save the bacon. At least, that is the widespread impression.

Norm Weston, of the Cattle Traders Company, knew Sig Malter casually, as he had bought cattle from him on infrequent occasions. Malter called on Tuesday and spoke to Weston. "I have 20 heifers I want to sell," he told Weston.

"Okay, I'll send a man around to look them over," Weston answered.

Inspection on Wednesday led to approval. On Thursday, Weston mailed Malter a check for $5,000. Early Friday morning the trading company had a visitor.

"That cattle you bought from Malter is not his. We have a lien on it," the visitor said. Weston's feet, comfortably stretched on the desk, hit the floor with a bang. "Call the bank!" he told his secretary. "Stop payment on that $5,000 check!"

Next, he telephoned Malter. "We deny the lien." Malter answered. "It's not valid. Sorry about the check, but I've already deposited it."

Weston shrugged. "We don't intend getting in the middle of this argument. Take back the cattle – the check won't be paid."

Bad news came to Weston the next week in a telephone call from Malter's bank. "About that check to Malter that you stopped – he already drew on it for $3,500. It's up to you to make good on it."

"You paid on it?" Weston was astonished. "Didn't you even wait until it cleared?"

"Not with an old depositor like Malter," the bank answered. "He has privileges. We assumed your check was perfectly valid."

"I won't pay a cent," Weston retorted:

1. I gave my bank a stop payment notice in time.
2. If you choose to pay on a check before it clears, that's your baby, not mine.

The bank officer answered:

- On the contrary, we have the law on our side. We do not have to anticipate a stop payment order we know nothing about.

The bank sued for the $3,500.

Did Weston Have To Pay: YES ☐ NO ☐

(See Decision – Page 4)

CAN YOU ALWAYS RELY ON THE SAMPLE SUBMITTED WHEN PURCHASING GOODS?

What Happened: The Brady Corporation was always on the alert for bargains in Government surplus. One day, Joe Brady received a notice from the Army that 15,000 pounds of elastic webbing were available for sale at its Keokuk, Iowa, depot. He had no representative in the area to examine the goods and he didn't want to bother making a trip from New York on a possible wild-goose chase. Brady therefore called the Army warehouse and asked them to send him a sample of the webbing.

The next day's mail contained the webbing – together with an invitation to submit a bid. Brady liked the sample. He made a 45¢ per pound bid for all the webbing and was elated to learn that it was accepted. He immediately sent out a check to Uncle Sam for the $6,750.

When the goods arrived in New York, Brady's joy turned to sorrow. The webbing was nothing like the sample he had examined – it was dirty, stained, curled, twisted and wrinkled. Once again Brady was on the phone to Keokuk, Iowa:

- What kind of junk are you people trying to stick me with? I offered to buy webbing like the sample you sent me.
- Take back your shipment and return my money!

To which the Army icily retorted:

1. Please read your contract. Condition #1 says: "All property is sold 'as is' without express or implied warranty of any kind."
2. You should have inspected the goods before you made your bid.

"Why did I have to make an inspection?" Brady shouted. "You sent me a sample. I have a right to rely on the sample. If the goods don't match the sample, I don't have to accept them!"

When the Army refused to budge, Brady sued for a refund.

The Decision: *No refund. The buyer is stuck with the goods,* ruled the U.S. Court of Appeals.

"In disposing of surplus, the Government is not engaged in normal trade and frequently is ignorant of the condition of the goods it sells. Buyers have no right to expect, have notice not to expect, and contract not to expect any warranties whatsoever.

"Here the Government in effect was saying: We have 15,000 pounds of elastic scrap which we think is like this sample and would like to know what you will give for it. But you will have to take it as it is and take your chances as to its condition." (187 F. 2d. 109)

Comment: Government surplus sales are usually "as is." The burden is on the buyer to inspect the goods being offered. He should not rely on samples, even though they are furnished by Uncle Sam. A purchaser who fails to take the necessary precautions may find himself buying "a pig in a poke."

In this case, the Court ruled that the sample mailed to Brady was merely an indication of the type of webbing available. It was not a promise that the bulk of the goods would conform to the sample submitted.

☛ **Protection For The Purchaser:** If a buyer intends to bind a seller to the quality of the sample, he should make sure that this is spelled out in the agreement. A phrase like "as per sample submitted" will usually suffice. In addition, the pact should be scrutinized to eliminate any conflicting provisos – like "as is."

IF YOUR CUSTOMER CANCELS HIS ORDER CAN YOU KEEP HIS DEPOSIT?

What Happened: A cash deposit to a seller is like diamonds to a girl. It's his best friend. Without a deposit, you might go to all kinds of expense preparing your product for shipment – only to find your customer backing out because of some unforeseen contingency.

The size of the deposit was the crux of difficult dickering between Mailer Manufacturing Co., an American firm producing printing presses, and Amtorg, the Russian purchasing agency. Price was no object–it was set at $300,000–but Mailer insisted on a $75,000 deposit, which Amtorg finally forked over.

Later events proved Amtorg's hesitancy justified. The U.S. Government denied the Russian agency an export license for the presses. Amtorg hurriedly placed a call to the manufacturer to break the bad news and cancel the deal.

"Nyet," said the manufacturer. "Those presses are already assembled, crated and ready for shipment."

"Without an export license, they're useless to us," lamented the agency. "We can't accept delivery."

"In that case," concluded the manufacturer, "we'll try to unload them elsewhere–but you can consider you deposit forfeited."

One month later, Amtorg got wind that the manufacturer had sold the presses–at an $18,000 profit over and above the price to the Russians! Once again, the hot line between them buzzed: "We understand you made an extra profit on those presses. We demand a return of our deposit–*plus* that profit!"

"Are you kidding? You're not entitled to a penny. The deposit was forfeited and the profit belongs to us." An iron curtain descended between the disputants–and the cold war was carried to the courts.

The Decision: *The manufacturer keeps the profit–but the deposit must be returned,* ruled the U.S. Court of Appeals.

Mailer can only keep enough money to cover any loss it suffered because the Russians reneged on the deal. Since there was no loss, it must return the deposit. As for the profit, the judges saw no reason why Amtorg should benefit from Mailer's good business sense. (206 F. 2d 103)

Universal Rules on Deposits: The Uniform Commercial Code covers the subject of deposits—and should be the guiding consideration of a businessman when working out a deal. The Code says:

1. You and your customer can agree on a fixed sum as damages for refusal to take delivery. That understanding will be enforced if the amount is not unreasonably big.
2. If there is a deposit—but no agreed amount of damages was fixed—you can keep (out of the deposit) either 20% of the price of the goods or $500—depending on which is smaller.
3. You must return the balance of the deposit unless you can prove that your damages (usually in the form of lost profits) were greater than the amount you kept.

SHOULD YOU CANCEL YOUR PRODUCT LIABILITY POLICY WHEN YOU STOP MANUFACTURING AN ITEM?

What Happened: When a company decides to discontinue an unprofitable operation, workers are discharged, the plant is closed down, inventory is disposed of, and insurance policies are cancelled. Unfortunately, such hasty action with a product liability policy can result in serious consequences. Take the case of a large Eastern research laboratory.

Simbini Labs was a well-known organization specializing in biochemical research. To capitalize on its excellent reputation, management decided to manufacture and distribute its own brand of laboratory equipment. As a necessary precaution, the company's insurance broker was directed to obtain a product liability policy.

The manufacturing end of the business never proved successful. After a five-year struggle, Simbini's board of directors decided to discontinue manufacturing and concentrate instead on laboratory research.

A vice president was delegated to arrange the winding-up operations. He called the insurance broker and told him to cancel all policies on the factory effective the day it ceased operations.

Six months later, Simbini was hit with a whopping law suit. A centrifuge manufactured two years earlier had suddenly gone wild, seriously injuring a lab technician. Clucking sympathetically for the victim, the vice president forwarded the papers to the insurance company.

Back they came by return mail, with a curt note reminding him that he had cancelled the policy six months ago. The VP ran to the insurance company and demanded to see the boss, claiming:

- That centrifuge was manufactured while your insurance policy was in effect. Why do you think we paid you premiums for five years!

"Please read the insurance policy you had," replied the company man:

1. Paragraph V says: "This policy applies only to accidents which occur during the policy period."
2. We suggest you hire a good lawyer to defend the suit.

"You people better hire a good lawyer, because we're going to sue you!" was the officer's rejoinder.

The Decision: *Simbini had no insurance coverage at the time of the accident,* ruled the N. Y. Supreme Court.

Although policies are interpreted whenever possible in favor of the insured, "Paragraph V of the policy explicitly limits application of the policy to accidents which occur during the policy period.

"The Court must accord to this clause its ordinary and usual meaning and may not extend it to include accidents occurring after the policy was cancelled." (129 N.Y.S. 2d 84)

☛ **Who Reads Insurance Policies?** Unfortunately, very few businessmen. If the vice president had taken the time to discuss the coverage with the broker, or had read the policy himself, Simbini would not have found itself in its present predicament.

There Are No Standard Forms for product liability insurance. Some policies, as here, provide coverage only for *accidents occurring during the policy term.* Other policies cover *products manufactured during the policy term,* while yet other policies cover *both* contingencies.

→ **Warning!** Recent court decisions have increased manufacturers' exposure to product liability suits. Previously, an injured person could only sue the retailer who sold him the product, and he had to prove that the product was actually defective.

Now, many courts permit a purchaser to sue the manufacturer directly. If he shows that the product failed to do its job, the manufacturer can be held liable.

You Be The Judge

The Decision: *For the bank.* It had paid out on the check on Friday prior to the time it could have been advised by Weston's bank of the stop payment order. It is, in parlance of the law, a "holder in due course" – which means the bank has a right to protection so long as the check was validly issued and the bank had no way of knowing it had been stopped.

A bank has the privilege of allowing a depositor to withdraw money on an uncleared check, a Federal District Court said. The fact that it may take a risk with a depositor is its own concern, and no argument can be raised by a man who issues a valid check. (254 F. Supp. 265)

☛ **Second Thoughts:** Fortunately for those who issue checks one day and seek to stop them the next, most banks do not permit a depositor to draw on it before it clears. However, this is not an invariable rule by any means, and oldtime depositors can have special privileges.

When you issue a stop payment order, remember it goes to *your* bank and not the payee's. *Your* bank knows about it – but *his* does not.

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INDEX

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Dear Sir,

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